No. 324.

In the Supreme Court of the United States

OCTOBER TERM, 1927.

M. O. DANCIGER AND EMERICH OIL COMPANY, A CORPORATION, PETITIONERS,

VS.

N. K. SMITH, RESPONDENT.

PETITIONERS' REPLY BRIEF.

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REPLY BRIEF.

In our brief in chief we advanced two separate and distinct reasons why respondent's claim against petitioners constituted a part of his estate in bankruptcy.

The first reason is that because the assignments of the same were not acknowledged and filed as required by the Texas statute, that therefore, such assignments were void under the provisions of the Bankruptcy Act as against a trustee in bankruptcy. The second is that inasmuch as these assignments were given only as security, as distinguished from an outright sale of the same, that therefore, the claim constituted a part of the bankrupt estate and may be administered by the bankruptcy court. Respondent in his brief apparently

does not take issue on the second reason and in his brief concedes that we have correctly stated the facts in our brief.

Respondent, however, does question our contention that the assignment is void against a trustee in bankruptcy because not acknowledged and filed in compliance with the Texas statute. Before proceeding to answer this contention, we invite attention to the fact that if respondent's claim against petitioners for either reason given constituted a part of the bankrupt estate, then we are undoubtedly correct in the ultimate contention that the Texas courts have erred. In other words, the Texas statute could be put out of the picture entirely and still our ultimate contention be valid because the assignments were only made for security and were not intended to and did not constitute, according to respondent's own testimony, a sale or other disposition of the claim, and all property covered thereby constituted part of his estate in bankruptcy. With this clarification of the relative importance of the interpretation of the Texas statute, we address ourselves to a consideration of respondent's contentions in this respect.

I.

Respondent says that this statute is a notice statute only for the benefit of *subsequent purchasers* and some Texas cases are cited which might possibly be construed as giving some countenance to this view, although it must on the other hand, be conceded that no Texas case has been decided involving a state of

facts such as the state of facts involved in this case. Texas cases are cited by respondent to the effect, that the statute does not have the effect of invalidating an equitable assignment of a judgment or cause of action, but this, it seems to us is considerably different from the question of whether or not a trustee in bankruptcy would have a better title than an equitable assignee. The concluding sentence of the statute is:

> "When said transfer is duly acknowledged, filed and noted as aforesaid the same shall be full notice and valid and binding upon all persons subquently dealing with reference to said cause of action or judgment whether they have actual knowledge of such transfer or not."

For respondent to successfully contend that this language only includes subsequent purchasers, a very much more restricted meaning must be given to the language employed than is given to such language when otherwise used in the law. The language used does not mention subsequent purchasers. On the contrary, it mentions "all persons subsequently dealing with reference to said cause of action." This is very much broader language than "subsequent purchasers" and had the legislature intended to include only subsequent purchasers, it is remarkable that it employed the broader and more inclusive language found in the statute. "All persons" cannot be construed to mean only "subsequent purchasers." "Persons subsequently dealing with reference to the cause of action" cannot be construed to mean only "purchasers." The statute does not say "dealing with the cause of action or judgment," but says "dealing *with reference* to said cause of action

or judgment." Dealing with reference to a cause of action is broader and more inclusive than dealing with a cause of action. A person may deal *with reference* to a cause of action and not be a purchaser of the same. A subsequent creditor may actually in point of fact, or constructively in point of law, deal with reference to the cause of action or judgment. The trustee in bankruptcy, being the legal assignee of all the property of the bankrupt, deals with reference to the cause of action.

The case of *Smith* v. *Railway Co.*, 39 S. W. 969, is the principal case cited by respondent as interpreting the statute as applying only to subsequent purchasers. From reading this case it will be seen that the decision is based on the general principle of law that, where property is attached or writ of garnishment issued, that the attaching creditor only reaches such interest in the property attached or garnished as was then owned by the attachment debtor. An attachment creditor does not obtain any title to the property but can only obtain a judgment whereby the interest of the judgment debtor in the property attached may be sold.

A trustee in bankruptcy on the other hand is in an entirely different position because he becomes, by operation of law, the absolute owner of the bankrupt's assets. He is the legal assignee of all of the property of the bankrupt and is a purchaser by operation of law. He holds the title thus obtained to pay the costs of administration of the estate and claims against the estate. He has, therefore, greater rights than an attaching creditor. When the law vests in the trustee title to all

of the bankrupt's property and the trustee seeks to reduce the property to absolute possession and demands the property and any third person claims title to the property as against the trustee in bankruptcy, the trustee is undoubtedly dealing with reference to the property within the meaning and intent of the language used in the statute. Although the trustee takes title subject to all legal and equitable liens existing against the same, yet, if a claim of lien is made void by statute as to all persons subsequently dealing with reference to the property, then the trustee, if in the class mentioned by the statute, undoubtedly has the better title and the alleged lien is void as to him. No reason is or can be advanced why a trustee in bankruptcy may not be a person subsequently dealing with reference to the cause of action.

The statute says that if the transfer is acknowledged, filed and noted, that the same shall be full notice and valid and binding. Is not the converse true—namely that if the transfer is not acknowledged, filed and noted, then the same is not full notice and not valid and not binding upon all persons subsequently dealing with reference to said cause of action? We do not see how escape from this conclusion can be made.

To apply this statute only to subsequent purchasers is to give it a far more restricted meaning than the language used necessarily, by all the rules of construction and according to the accepted meaning of the English language requires.

This court is not concluded by the construction of the statute under the state decisions where a broader

construction is required in order to give full force and effect to the Bankruptcy Act.

Thus in *Board of Trade of Chicago* v. *Johnson,* 264 U. S. 1; 44 Sup. Ct. Rep. 232, it is said:

> "Congress derives its power to enact a bankrupt law from the federal constitution and the construction of it is a federal question. Of course, where the bankrupt law deals with property rights which are regulated by the state law, the federal courts in bankruptcy will follow the state courts; but when the language of congress indicates a policy requiring a broader construction of the statute than the state decisions would give it, federal courts cannot be concluded by them. *Board of Trade* v. *Weston,* 243 Fed. 332, 156 C. C. A. 112."

The above language was used with reference to the question of whether or not a membership in the Chicago Board of Trade was property passing to a trustee in bankruptcy and which had been previously held by the Supreme Court of Illinois not to be property.

In the case of *Burgess* v. *Seligman,* 107 U. S. 20; 2 Sup. Ct. Rep. 10, this court had under consideration the proper construction to be given to a Missouri Statute, which statute provided that stockholders of a corporation at its dissolution should be liable for its debts, but that no person holding such stock as collateral security should be subjected to such personal liability. Pending suit the Missouri Supreme Court held these same stockholders liable at the suit of another plaintiff. But this court held that the Missouri Statute, although thus construed by the Missouri Supreme Court in a case against the same stockholder was not properly subject to such construction and gave to it the construction

which this court deemed the language of the statute required, and contrary to the result reached by the Missouri Supreme Court. This court there said in part:

> "We do not consider ourselves bound to follow the decisions of the state court in this case. When the transactions in controversy occurred, and when the case was under consideration by the circuit court, no construction of the statute had been given by the state tribunals contrary to that given by the circuit court. The federal courts have an independent jurisdiction in the administration of state laws, co-ordinate with and not subordinate to that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference.
> * * *
>
> "Acting on these principles, founded as they are on comity and good sense, the courts of the United States without sacrificing their own dignity as independent tribunals endeavor to avoid and in most cases do avoid, any unseemly conflict with the well-considered decisions of the state courts. As however, the very object of giving to the national courts jurisdiction to administer the laws of the states in controversies between citizens of different states was to institute independent tribunals which it might be supposed, would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication."

It therefore, seems clear that the proper construction of the Texas Statute is open to this court in this case, first because the exact question has not been decided by the Texas courts, and second, even if it had

been decided in a manner to require the construction contended for by respondent, such construction would be so contrary to the language employed in the statute and so unharmonious with the intention of Congress as expressed in the Bankruptcy Act as to necessarily require this court to give a broader meaning and construction.

We direct attention to the fact that neither the Court of Civil Appeals nor the Supreme Court of Texas in passing on the instant case, made any mention whatsoever of the statute in question, but both courts went off on the proposition that inasmuch as no trustee was appointed or elected, that therefore, title had not been and could not under any view be considered as divested out of the bankrupt and no other questions were considered by either of the Texas courts.

N. B. In our brief in chief we note that we have referred in several places to the Texas statute as covering choses in action. The term "choses in action" includes claims which are not yet due and for which no action has been brought. The Texas statute is not this broad, but only includes choses in action which are actually in suit.

II.

In our brief in chief we rather assumed without expressly asserting it, that a creditor could have obtained a lien by legal or equitable proceedings under the laws of Texas on the claim of respondent against petitioners. In respondent's brief it is not expressly contended otherwise, but respondent quotes from Collier on Bankruptcy to the effect that state laws control as to

what rights or lien an execution creditor would have. If this quotation by respondent is for the purpose of contending that a creditor could not have obtained a lien by legal or equitable proceedings against this claim, then we desire to direct attention to the fact that a judgment creditor or an attaching creditor could have fastened a lien upon respondent's claim either through process of garnishment under the laws of Texas or through the assistance of a court of equity.

For authorities holding that such claim is subject to garnishment, see the case of *Ackerman* v. *Tobin*, 22 Fed. (2d.) 542 (8th Circuit) in which is a collation of authorities as to when a claim is sufficiently certain and liquidated to be the subject of garnishment and in which Texas cases are cited and quoted from for the proposition that when a claim is no longer contingent that then it may be reached by garnishment. Of course the claim set up by respondent against petitioners was on a contract under which he claims to have performed services and was not contingent.

If the process of garnishment is insufficient, then the Texas courts hold that in a proper case a judgment creditor may have the assistance of a court of equity to fasten a lien on choses in action which cannot be reached by the ordinary processes of attachment and garnishment. See the following cases:

Arthur v. *Batte*, 42 Tex. 159.
Taylor v. *Gillean*, 23 Tex. 508.
Price v. *Brady*, 21 Tex. 614.

III.

We find in respondent's brief no sufficient answer to the fundamental proposition that a bankrupt cannot

be permitted to conceal from the bankruptcy court and from his creditors the existence of property and cause no trustee to be appointed or elected and then, after he has obtained his discharge from all of his debts, proceed to prosecute an action to recover property, not for the benefit of the bankruptcy estate, but either for himself or for the benefit of favored creditors. By his representations to the bankruptcy court on his oath that he had no property and that he had transferred no property as security, and by causing the bankruptcy court to enter judgments upon such representations, he is estopped to maintain a suit to recover property thus concealed, whether he be recovering it solely for his own benefit or solely for the benefit of a favored creditor or for both.

Respondent seems to inject into his brief the idea that if he is prosecuting the suit solely for the benefit of his favored creditors, to whom he alleges the claim was assigned, that then there is nothing to prevent his maintaining the suit for that purpose. Of course we do not for one minute concede that the suit is solely for the benefit of his two favored creditors, because it is apparent from his own testimony that he is profiting by the maintenance of the suit not only because the property assigned and the amount thereof assigned exceeds the amount of debts claimed to be due Cranfill and Hutchinson, but also because respondent is profiting in having his two favored creditors paid. Although it is not necessary in this case to so hold, yet we believe that it is undoubtedly the law and must be held to be the law, that whenever a bankrupt in

bankruptcy proceedings on his oath asserts that no property whatever has been transferred as security to any creditor that a suit thereafter cannot be maintained by the bankrupt in his own name to recover, even if it is only for the benefit of the assignee. The reason for this is because to hold otherwise is to open the door wide for the perpetration of fraud. That the assignee could sue and recover in his own name is an entirely different question. But to permit a bankrupt to swear and represent that no property has been assigned as security and then maintain a suit in his own name to recover property by him now claimed to have been so assigned (without regard for whose benefit the suit is now claimed to be maintained) is to permit the bankrupt to impeach his own conduct in the bankruptcy court and the judgments, orders and proceedings of that court; a thing not allowable under any view of the law.

IV.

Respondent finally seeks to cloud the real question involved by stating in effect that petitioners do not claim that the judgment, so far as the merits of the case are concerned, is improper. This assertion is exceedingly unfair. When petitioners are sued they have a right, if there is a reason why the respondent cannot legally prosecute his suit in the manner that it is brought, to stand on that proposition. When a suit is brought by a proper party petitioners then have a right to bring forward their defenses as to the merits of the case. Our contention in this case is, that respondent prosecuted the suit, not for the benefit

of the bankrupt estate, not for the benefit of his trustee in bankruptcy should one be hereafter appointed, and not for the benefit of his general creditors, but for himself and for the benefit of his two favored creditors and in legal effect denying, that his estate in bankruptcy or the trustee in bankruptcy or his general creditors had any interest whatever in the claim. Had respondent sued for the benefit of the bankrupt estate or for the benefit of the trustee in bankruptcy, petitioners would have had an entirely different case to meet and would have made an entirely different defense and would not have relied as extensively as they have done on the question which has been raised by them from the very inception of this litigation.

We are not now dealing with the question of the merits of the case—we are dealing with a question that lies across the threshold before we meet the merits of the case, viz., whether or not this plaintiff has any right to prosecute this suit in the manner and for the purpose he is attempting to prosecute the same. We will have more to say about the merits at the proper time and place, but now the question is, whether this suit can be maintained by this respondent under all the facts and circumstances detailed. If it can, then, of course, the judgment will have to stand. If, on the other hand, the respondent is not legally entitled to maintain this suit, then the very foundation of his case and judgment falls, just as it did in the case of *First National Bank of Jacksboro* v. *Lasatar*, *supra*. In respondent's brief he expressly denies that his estate or general creditors, or trustee in bankruptcy have any

interest or right to this claim or any part of it. Petitioners are willing to pay whatever is justly due from them and the question of what is justly due is not the question now involved but they are now simply contending, that this respondent cannot appropriate for himself and his favorite creditors or either or both of them what belongs, if it belongs to anyone, to his estate in bankruptcy and general creditors.

Respectfully submitted,

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